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No. 101824-0

SUPREME COURT
OF THE STATE OF WASHINGTON

RICKEY FIEVEZ, individually, KYLE FIEVEZ, individually, and TYLER FIEVEZ individually,

Appellants,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondent.

ANSWER TO *AMICUS* MEMORANDUM

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A. INTRODUCTION

The Kays *amicus* memorandum does an excellent job of highlighting why this is a Supreme Court case and debunking the argument advanced in the Department of Corrections ("DOC") answer to the petition for review that the ample causation evidence presented below was merely "speculative." Cases involving DOC's negligent failure to properly supervise a violent felon on community supervision are publicly significant in nature because they all too often result in tragic consequences, as was true of Rickey Fievez's paraplegia.

Lower courts in Washington frequently overlook the clear-cut direction on probable cause that this Court established in cases like *Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992) and *Joyce v. State, Dep't of Corrections*, 155 Wn.2d 306, 119 P.3d 82 (2005). Proximate cause is a *jury question*.

Those lower courts seemingly want to protect the DOC and the State from tort liability for their egregiously negligent community supervision of violent offenders like Timothy Day

here. But the answer to State liability is not to effectively lower the bar for proper DOC community supervision of such high risk, violent offenders, but to incentivize DOC and the State to take their community supervision responsibilities seriously and to protect innocent people like Rickey Fievez from violent offenders in their midst.

The deterrent purpose of tort law[1] is of critical importance here. If DOC and the State's elected leaders believe they face no liability for failing to effectuate community supervision that is safe for the public and beneficial to those offenders who truly

[1] This Court noted the deterrent effect of tort law generally in *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419-20, 150 P.3d 545 (2007), and specifically in the context of DOC conduct, stressing that imposing liability on the State "can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used" in *Savage v. State*, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995). Tort liability for negligent state agencies will also allow some measure of justice and recovery for victims. *See, e.g.*, *Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143 (1991) ("The existence of some tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility that those injured by DSHS's negligence can recover.").

want to improve their lives, they will not spend the money to provide the necessary Community Corrections Officers ("CCOs") with reasonable caseloads to monitor offenders effectively. The public will be at risk.

This Court should grant review to reaffirm the rule on proximate cause it has set so often in the past and to allow a jury to decide proximate cause in this case. RAP 13.4(b).

B. STATEMENT OF THE CASE

The Kays *amicus* memorandum adopts the statement of the case in the Division I opinion, op. at 1-2, expanded upon in Fievez's petition, pet. at 1-4. Taking the facts, and reasonable inferences from the facts, in a light most favorable to Fievez, as the non-moving party on summary judgment, as this Court must, *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 485, 258 P.3d 676 (2011), it is clear that CCO Nancy Carrigan's supervision of Timothy Day, an offender that DOC itself deemed to be a "high violent" risk, given his lengthy violent criminal history, his drug abuse, his mental health issues, his historic

disrespect for conditions of community supervision, and his fascination with firearms, was superficial at best. Although Day required *intensive* supervision, CCO Carrigan didn't bother to learn of his history, to interview "collaterals" like the Stinsons, who lived with him, or to follow up on his violation of the conditions of his community supervision when he didn't tell her where he was living, and he (and his firearms) moved into Annaliese Richmond's home where more guns were present, including the .357 Magnum handgun used to shoot Rickey Fievez.

Moreover, DOC's Community Victim Liaison, Sherina James, never reported the concerns of Marceline Daarud, Day's ex-wife (and domestic violence victim), about his possession of his father's guns to Carrigan, another factor that should have put Carrigan on alert about Day.

DOC's own staff, CCO Ted Creviston, Community Corrections Supervisor Lisa Rohrer, and administrators Donta Harper and Shelia Lewallen were critical of Carrigan's

supervision of Day. Pet. at 2; br. of appellant at 3-29.

This Court should give little credence to the effort by DOC in its answer at 3-9 to sanitize the facts to attempt to transform Day into a model offender and to make its negligent supervision of Day "appropriate," something that it decidedly was not.

C. ARGUMENT WHY REVIEW SHOULD BE GRANTED[2]

DOC effectively *concedes* that it owed a take-charge duty to Fievez where it exercised control over Day in its highly flawed community supervision of him. As the Kays memorandum notes at 2, 4-5, cases like *Taggart* make clear that DOC had a duty to Fievez to take *reasonable* precautions to protect against *reasonably foreseeable* dangers posed by Day's dangerous

[2] Contrary to DOC's contention, ans. at 1-2, Fievez did not confine his argument to merely the one facet of DOC's breach of duty. Division I *sua sponte* addressed breach. Op. at 13-18. Fievez's petition noted in detail that DOC breached its duty to him in *numerous* ways. As noted *infra*, breach was not even a basis for the trial court's decision. DOC's attempt to construct a bogus "waiver" argument on duty/breach, when the issue in the case has always been proximate cause, should be rejected.

propensities. *Joyce*, 155 Wn.2d at 310.

(1) The Central Purpose of Community Supervision–Public Safety–Will Be Undercut by Division I's Analysis

Community supervision has had a checkered history in Washington law,[3] but the central thrust of such community supervision is that properly motivated offenders will transition from the institutional setting to a lawful and productive life, and the public will be protected by DOC's close supervision of those offenders' compliance with their court-ordered conditions for living and working in the community. This policy derives from the definition of "community custody" as that portion of an offender's sentence "served in the community subject to controls

[3] The original Sentencing Reform Act of 1981 had only very limited community supervision provisions. *See generally*, Seth Fine, 13B *Wash. Practice*, § 42.10 (3d ed.). Over the years, the Legislature created the concept of community custody and expanded community supervision. RCW 9.94A.701 (community custody); RCW 9.94B.050 (community supervision). In 2009, the Legislature provided for fixed community custody ranges, depending upon the nature of the crime committed by the offender. RCW 9.94B.050.

placed on the offender's movement and activities by the department." RCW 9.94A.030(5); *In re Petition of Smith*, 139 Wn. App. 600, 603 n.1, 161 P.3d 483 (2007). Indeed, DOC must assess the risk level of offenders placed in the community. RCW 9.94A.501.

Given the breadth and nature of the mandatory and permissive conditions to community custody set forth in RCW 9.94A.703 and addressed in the case law, it is clear that a significant facet of those conditions is to protect the public from the criminal impulses of the offender. *See, e.g.*, *In re Matter of Sickels*, 14 Wn. App. 2d 51, 469 P.3d 322 (2020) (addressing a variety of conditions for conviction of second degree attempted rape of a child, some of which were lifetime in duration).

(2) Breach Is a Question of Fact

Fievez's petition at 5-6, and the State's answer at 13-14, both reference breach only tangentially. The trial court's grant of summary judgment did not even mention breach specifically. RP 29-39. The trial court correctly believed that fact issues

surrounded gross negligence, a breach question. RP 31-32. Breach is ordinarily a fact question. *Swank v. Valley Christian School*, 188 Wn.2d 663, 686-87, 398 P.3d 1108 (2017); *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Division I agreed with the trial court, identifying how Carrigan's failure to review Day's criminal history and records from his prior DOC supervisions failed to meet the "slight care" standard for gross negligence, op. at 13-18, creating a fact issue for the jury on that issue at a minimum. As noted *supra*, Fievez's duty/breach arguments are not limited to CCO Carrigan's failure to appreciate Day's violent criminal history or his past interactions with DOC.

(3) Proximate Cause Is a Question of Fact

The more central issue presented by Fievez's petition and addressed in the Kays memorandum is how Division I erred in its treatment of proximate cause, upholding the trial court's decision on causation as a matter of law, intruding upon the jury's role, op. at 19-22, meriting review by this Court. RAP

13.4(b)(1).

(a) But For Causation

In Washington, proximate cause is classically a *question of fact, Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011).

In take-charge type duty cases, this Court has refused to address causation as a matter of law. Notwithstanding DOC's effort to distinguish it, ans. at 18-19, 24, in *Joyce*, *supra*, this Court rejected a similar proximate cause argument in the specific context of DOC's community custody of an offender. It was *not* speculative that Vernon Stewart should have been in jail making it impossible for him to kill Paula Joyce in a vehicular collision. This Court relied on the fact that Stewart had been sentenced to jail for prior parole violations and the plaintiffs' expert testified that had DOC obtained a bench warrant for his arrest, he would have been in jail and would not have killed Ms. Joyce. 155 Wn.2d at 322-23.

While DOC tries to distinguish take-charge duty cases

arising in the school setting, ans. at 16, those cases are, in fact, take-charge duty cases like the present case and they make clear causation is a fact issue. *N.L. v. Bethel School District*, 186 Wn.2d 422, 437, 378 P.3d 162 (2016); *Meyers v. Ferndale Sch. Dist.*, 197 Wn.2d 281, 289, 481 P.3d 1084 (2021). Similarly, as to patient-therapist cases, another take-charge type duty setting, ans. at 17, this Court has held that causation is a fact question, rejecting arguments that the evidence of causation is too "speculative." *Petersen v. State*, 100 Wn.2d 421, 436, 671 P.2d 230 (1983); *Volk v. DeMeerleer*, 187 Wn.2d 241, 276-78, 386 P.3d 254 (2016).

For the reasons articulated in Fievez's petition at 13-17, and the Kays memorandum at 6-8, a fact issue on causation was present where competent DOC supervision of Day, a "high violent" risk with a long history of mental instability, drug use, disobedience of court-ordered conditions, and a fascination with firearms, would have resulted in his arrest and incarceration for firearms violations or violations of the no contact order as to

Daarud.

Critically, competent supervision would have prevented his access to Richmond's firearms specifically. Neither Division I nor DOC address the significance of the fact that CCO Carrigan was negligent in allowing Day to move in with Richmond. Had Carrigan done her job, Richmond would have been notified of Day's status, and, as she testified, she would immediately have sold or relocated the .357 Magnum Day used to harm Fievez. CP 873-74. Day could not have shot Fievez with that gun.

Ample evidence from Dan Hall, a former CCO, and Judge Gary Tabor documented that but for DOC's negligent supervision of Day in the community, he would not have been able to harm Fievez. He would have been incarcerated. That testimony should have defeated summary judgment. *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019).

As evidenced throughout the DOC answer with its *repeated* assertion that any evidence offered by Fievez is "speculative," and as noted in the Kays memorandum at 10-11,

DOC falls back on the old, tired cliche that any expert testimony contrary to its factual narrative is "speculative." Division III's opinion in *Behla v. R.J. Jung, LLC*, 11 Wn.2d 329, 453 P.3d 729 (2019), *review denied*, 195 Wn.2d 1012 (2020) does a very effective job of rejecting such a rote argument often advanced on summary judgment by defendants. The thrust of DOC's argument is that virtually *any* testimony about what DOC or a court would have done to an offender in violation of the conditions of his/her community custody is "speculation," and that victims of such offenders can never prove causation, unless DOC actually disciplined the offender. In effect, only DOC's evidence in these cases is not "speculation" in DOC's eyes. Of course, CCO Carrigan's negligent supervision of Day *prevented* Day's proper discipline and incarceration, as a reasonable jury might decide.

The practical effect of Division I's opinion forecloses a plaintiff from *ever* being able to show a causal connection between DOC's negligent supervision and the plaintiff's injuries

when DOC's breach arises from its failure to detain and refer an offender for prosecution. Put another way, whenever an offender should have been prosecuted and incarcerated–a situation that necessarily will arise with great frequency–Division I's opinion forecloses liability even when an expert testifies on a more-probable-than-not basis that the offender would have been imprisoned if DOC had used slight care. This proximate causation issue will arise in virtually all DOC take charge duty-type cases.

This Court should grant review to reject DOC's thinly-veiled immunity argument adopted by Division I. RAP 13.4(b)(1).

(b) Legal Causation

The Kays memorandum at 8-9 also effectively addresses why the legal causation principles raised by DOC in its answer at 26-27 as an afterthought do not apply. Specifically, duty and legal causation involve similar principles. *Lowman v. Wilbur*, 178 Wn.2d 165, 171, 309 P.3d 387 (2013). Where DOC had a

duty to Rickey Fievez, legal causation did not bar his claim, particularly where "but for" causation existed. This Court has been exceedingly reluctant in its recent decisions to find claims barred on legal causation grounds. *See*, *e.g.*, Reply Br. of Appellants at 18-22. Legal causation, which was not a basis for Division I's opinion, does not foreclose the grant of review here.

D. CONCLUSION

Lower court opinions, like Division I's here, are all too willing to intrude upon the jury's fact-finding role in DOC take-charge duty cases, something this Court has rejected in *Joyce*.

As noted in the Kays *amicus* memorandum, the trial court and Division I erred in ruling as a matter of law on proximate cause in this case where fact questions were present as to whether DOC's egregious failure to supervise Timothy Day while he was in DOC's community custody resulted in Fievez's shooting and horrendous injuries. Review is merited. RAP 13.4(b)(1), (4).

This Court should reverse the summary judgment and remand the case to the trial court for a trial by a jury of Fievez's

peers. Costs on appeal should be awarded to Fievez.

This document contains 2,446 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of June, 2023.

Respectfully submitted,

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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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